IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1845

ROBERT E. KELLY, Chairman; JERRY A. DANZIG, Vice-Chairman; MICHAEL H. PRENDERGAST; ELI WAGER; and EDWARD J. WEGMAN, Commissioners of the New York State Commission on Cable Television,

Petitioners,

against

BROOKHAVEN CABLE TV, INC., CAPITOL CABLEVISION, INC.; SAMSON CABLEVISION CORP., TELEPROMPTER ELECTRONICS CORPORATION; WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NEW YORK STATE CABLE TELEVISION ASSOCIATION; and HOME BOX OFFICE, INC.,

and

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3444

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

CHARLES A. BRADLEY
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

Federal Statutes

New York Statutes

OTHER AUTHORITIES

Federal Regulations

Federal Communication Commission Orders

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

ROBERT E. KELLY, Chairman; JERRY A. DANZIG, Vice-Chairman; MICHAEL H. PRENDERGAST; ELI WAGER; and EDWARD J. WEGMAN, Commissioners of the New York State Commission on Cable Television,

Petitioners,

against

BROOKHAVEN CABLE TV, INC., CAPITOL CABLEVISION, INC.; SAMSON CABLEVISION CORP., TELEPROMPTER ELECTRONICS CORPORATION; WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NEW YORK STATE CABLE TELEVISION ASSOCIATION; and HOME BOX OFFICE, INC.,

and

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, the Commissioners of the New York State Commission on Cable Television, pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered on March 29, 1978.

Decisions Below

The decision of the Second Circuit Court of Appeals, not yet reported, is reproduced in the Appendix A. The decision of the District Court, 428 F. Supp. 1216 (N.D.N.Y., 1977), which was affirmed by the Court of Appeals, is reproduced in Appendix B. The Final Judgment of the District Court is reproduced in Appendix C.

Jurisdiction

This Court's jurisdiction is invoked pursuant to Title 28 United States Code, § 1254(1). The decision of the Court of Appeals was entered on March 29, 1978.

Questions Presented

1. Whether the United States Court of Appeals for the Second Circuit erred in ruling that the Federal Communications Commission has jurisdiction to preempt State regulation of rates charged for pay cable television, where this Court's consistent construction of Section 2(a) of the Communications Act of 1934 (47 U.S.C. § 152[a]) limits FCC jurisdiction over cable television to actions "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." (*United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 [1968]).

2. Whether the United States Court of Appeals for the Second Circuit was correct in holding that the Federal Communications Commission has, in fact, validly exercised a preemption of State regulation of pay cable television rates by the mere utterance of statements to that effect without any procedures for rule making, inquiry or the consideration of comments on this issue.

Statement of the Case

A. Introduction

This action was originally commenced in the United States District Court for the Northern District of New York. Respondents are five cable television companies with operations in New York, two trade associations and a service corporation which provides entertainment programming to cable television systems. The petitioners are the Commissioners of the New York State Commission on Cable Television, an agency of the State of New York created by Article 28 of the New York Executive Law. With the permission of the District Court, respondents were joined by the United States of America and the Federal Communications Commission ("FCC" or "Commission"), as intervenors, and petitioners were joined by the National Association of Regulatory Utility Commissions (NARUC), as intervenor.

Respondents alleged that actions of the New York State Commission on Cable Television, in an attempt to enforce New York statutory law which requires municipal and State approval of all rates charged to cable television subscribers, Executive Law, §§ 822 and 825, should be enjoined as violative of a valid federal preemption expressed by the FCC which prohibits State and local regulation of the rates charged for "pay cable" services (those programs sold for additional charges on a per-program or per-channel basis).

B. The Nature of Cable Television

"Cable Television" (or CATV) is a means of transmitting or delivering signals by wire or cable from an origination point to a receiving terminal, i.e., the subscriber's television set. The services that may be provided by cable television are virtually limitless and include the retransmission of over-the-air radio and television broadcast signals, the

transmission of locally originated video programming, computer data and a variety of other information and programming. At the present time, the majority of cable telesion companies in the State of New York provide a service package for a fixed amount which includes local and distant television and radio broadcast signals, and in certain cases, various channels dedicated to use by the local governments, the local school district and the public generally. In addition to the above service package, many cable television companies, including respondent-companies, provide non-broadcast programming or services for an additional per program or per channel charge. Such programming is generally referred to as "pay cable" or "premium programming." However, regardless of the type of services provided, it is the mode of transmission which makes cable television a distinctive communications medium and establishes the basis for State jurisdiction.

C. Regulation of Cable Television by the FCC

Direct regulation of cable television services by the FCC began in 1966 with the adoption of rules limiting the television broadcast signals that could be carried on cable television systems (former part 74 of the FCC's regulations). The FCC's jurisdiction to impose such signal carriage limitations was challenged and upheld by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). The Court in *Southwestern* found that the FCC's jurisdiction over cable television services could not be derived from any direct statutory language, but was a necessary complement to the express jurisdiction provided over radio services (including television broadcast stations) by the Communciations Act of 1934 (47 U.S.C. §§ 151, *et seq.*). The FCC's cable television jurisdiction was therefore limited to those actions "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178.

By 1969 the FCC had broadened its regulatory program for cable television services to require cable television systems with 3500 or more subscribers to initiate program origination.* This regulatory requirement was challenged, and eventually upheld by this Court in *United States* v. *Midwest Video Corp.*, 406 U.S. 157 (1972). In that case, a plurality of this Court found that the standard expressed in *Southwestern* had been met and that the new rules were "reasonably ancillary" to the FCC's television broadcast responsibilities. However, the concurring opinion of the Chief Justice expressed caution on the issue of FCC jurisdiction:

> "Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." 406 U.S. at 676.*

In 1972, the FCC adopted a comprehensive new regulatory program for cable television services (47 C.F.R. part 76, effective March 31, 1972). *Cable Television Report and Order*, 36 F.C.C. 2d 143, *affirmed on reconsideration*, 36 F.C.C. 2d 326 (1972). At that time it imposed limitations and requirements in areas not before addressed (*e.g.*, an obligation to obtain federal certification prior to operation—subpart B; mandatory standards for municipal franchises—subpart C; an obligation to protect the program exclusivity of local broadcast stations—subpart F; limitations on the types of programming that may be sold for additional charges—subpart G, section 76.225, and a

---

* *First Report and Order in Docket No. 18397*, 20 F.C.C. 201 (1969).

* See, also, Staff of Subcomm. on Communications, Comm. on Interstate and Foreign Commerce, Cable Television: Promise versus Regulatory Performance, 80-83 (1976) (Subcomm. Print) wherein it is stated (at page 80) that FCC authority to require "cablecasting" is not authority to regulate all aspects of cable TV.

requirement to provide access channels to the public and minimum channel capacity—subpar G, section 76.251). Several of these regulations were subsequently found to be violative of the jurisdictional limits imposed upon the FCC by the *Southwestern* standard: *National Association of Regulatory Utility Commissioners* v. *F.C.C.*, 533 F. 2d 601 (D.C. Cir., 1976), invalidating the purported FCC preemption of State regulation of cable television services providing two-way, poin-to-point, non-video, intrastate programming; *Home Box Office, Inc.* v. *F.C.C.*, 567 F.2d 9 (D.C. Cir., 1977), invalidating FCC regulations purporting to limit the programs that could be sold for additional charges; and *Midwest Video Corp.* v. *F.C.C.*, —— F. 2d ——, Slip op. No. 76-1496 (8th Cir., February 21, 1978), pet. for cert. filed 46 U.S.L.W. 3710, invalidating FCC rules requiring access channels and minimum channel capacity. These cases are discussed more fully below.

During the past twenty years various proposals have been submitted to Congress for the adoption of direct statutory federal jurisdiction over cable television services. With two exceptions, none of these proposals have yet been enacted. The two instances in which Congress has passed legislation regarding cable television regulation occurred within the last two years. On October 19, 1976 a new copyright law was enacted (Pub. L. 94-553, 90 Stat. 2541, Title 17 U.S.C.) which provided for the first time for copyright liability for cable television transmissions of broadcast signals. This statute provided no new regulatory authority for the FCC. On February 21, 1978 several amendments to the Communications Act of 1934 were enacted (Pub. L. 95-234, 92 Stat. 33), which for the first time provided reference to cable television regulation in that statute. However, these amendments were limited to the creation of an FCC forfeiture power over cable television operations (47 U.S.C. § 503[b]) and to the creation of FCC jurisdiction over the conditions of utility pole

attachments by cable television system (47 U.S.C. § 224). Even here, the FCC's jurisdiction over pole attachments is not preemptive of State regulation but, rather, would be effective only in the absence of comparable State standards. To date, Congress has failed to adopt express FCC regulatory authority over cable television services which would be preemptive of State or municipal jurisdiction.

D. Regulation of Cable Television by New York State

Cable television services have traditionally been subject to local government controls through means of contractual franchise provisions executed with local municipalities as a necessary requirement to operations in local public streets and rights of way. On May 24, 1972, the State of New York approved an act for the regulation of cable television services and the creation of a State Commission on Cable Television. Laws of New York, 1972, Chapter 466 (effective January 1, 1973); Executive Law, Art. 28, §§ 811, *et seq.* This act was expressly designed to coordinate with the newly adopted cable television regulations of the FCC, and was drafted in consultation with FCC staff.

The New York cable television statutory scheme provides for the primary regulation of this service to continue on the municipal level as a part of the negotiated franchise privileges of the operator. Executive Law, § 825. The Commission on Cable Television is authorized to promulgate state-wide standards and provide guidance and regulatory oversight. Consistent with this approach, subscriber rates are negotiated between the company and the municipality as a condition of the franchise, and amendments of the franchise (including rate modifications) are submitted to the State Commission for ultimate approval. Executive Law, § 822. In addition, pursuant to statutory direction (Executive Law, § 815), the State Commission on Cable Television has promulgated regulations which include minimum standards for municipal franchise agreements (9 New

York Codes, Rules and Regulations, part 595) requiring, among other things, the specification of rates for subscription channels. 9 N.Y.C.R.R. § 595.1(e).

At the time the New York cable television law and regulations were adopted they were not inconsistent with any federal standards or expressed policy. In fact, the regulations adopted by the FCC in 1972 (47 C.F.R. § 76.31[a][4] required that *all* subscriber rates be subject to the approval of the franchising authority.* This mandate was expressed without condition or exception:

> Section 76.31 Franchise standards.
>
> (a) In order to obtain a certificate of compliance, a proposed or existing cable television system shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:
>
> • • •
>
> (4) The franchising authority has specified or approved the initial rates that the franchisee charges subscribers for installation of equipment and regular subscriber services. No increases in rates charged to subscribers shall be made except as authorized by the franchising authority after an appropriate public proceeding affording due process;
>
> • • •

---

* Subdivision (4) of section 76.31(a) of the FCC's regulations was deleted by order in Docket No. 20681, effective September 23, 1976. *Report and Order,* 60 FCC 2d, 671, 38 Pike & Fischer RR 2d 110 (1976). Section 76.31(a) was eliminated in its entirety by *Report and Order in Docket No. 21002,* 66 FCC 2d 380, 41 RR 2d 885 (September 30, 1977). Unfortunately, neither of these actions eliminated the issue in dispute in this case.

E. The Asserted Preemption of Pay Cable Rate Regulations

It is not surprising that the regulations of the FCC did not make provision for pay cable services in 1972, because such services could best be described as in a pre-natal stage of development at that time. Subsequently, with the dramatic development of commercial markets for these new services, the FCC tried to do what it had not the foresight to do earlier.

Not until 1974 did the FCC make specific reference to its claimed preemption. *Clarification of the Cable Television Rules and Notice of Proposed Rule Making and Inquiry in Docket Nos. 20018 et al.,* 46 F.C.C. 2d 175 (1974). The alleged preemption was discussed as an accomplished fact. 46 F.C.C. 2d 199-200. This action was *not* described as a *proposed* preemption, although it was, in fact, a significant amendment of the then-effective section 76.31(a)(4). No attempt was ever made in this proceeding, or in any subsequent proceeding, to invite comments on this action. The 1974 *Clarification,* and all later FCC proceedings in which this preemption was discussed, dealt directly with other matters upon which comment was invited.

In New York, the State Commission on Cable Television acted as early as 1973 to insure that the rates for pay cable services were subject to municipal approval in accordance with State statutory requirements and consistent with the standards of the FCC at that time. On October 1, 1973, the State Commission obtained an Order from the Albany County Supreme Court restraining TelePrompter County Cable TV from imposing such charges in the City of Mount Vernon without municipal and State approval. This action was followed by an application for such approval submitted by this company and approved by the State Commission on October 19, 1973. On the same day, the State Commission issued a *Statement of Policy* regarding the "Rates Charged By Cable Television Companies for Subscription Programming," which indicated the State's intention to enforce

its statutory mandates and require approval of all such pay cable rates.*

On March 1, 1976, the State Commission issued its *Clarification of Commission Policy,* which reiterated its position of 1973.** It was in response to this action by the State Commission, and the proposed enforcement of State law described therein, that the respondents herein initiated the instant litigation.

The Decisions Below

The District Court (*Port,* J.) granted summary judgment to the respondents and declared that the FCC had preempted the regulation of rates charged for pay cable television. (Appendix B). An injunction was issued prohibiting the New York State Commission on Cable Television from regulating pay cable rates or from requiring cable television companies to specify pay cable rates in franchises granted by municipalities within the State of New York. (Appendix C).

The District Court's ruling accepted the arguments of the respondents that the FCC's jurisdiction over cable television services is broad and general and is supported by the general purposes section of the Communications Act of 1934 (47 U.S.C.C. § 152[a]), as confirmed by the Supreme Court in *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968), and *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972). The Court concluded that the alleged preemption was jurisdictionally valid and had been imposed by FCC.

Upon appeal, the Second Circuit Court of Appeals affirmed the decision of the District Court on both the juris-

---

* Appendix D.

** Appendix E.

dictional and procedural issues. The Second Circuit again cited this Court's decisions in the *Southwestern* and *Midwest Video* cases, and concluded that, "It follows that the FCC may regulate cable TV if its regulation will further a goal which it is entitled to pursue in the broadcast area." (Appendix A at p. 4a). The Court then applied this standard:

> "A decision to delay all price regulations of special pay cable meets that test; a policy of permitting development free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity, and far less intrusive than the mandatory origination rules approved in *Midwest Video.*" (Appendix A at p. 4a).

It summarily distinguished the holdings of the District of Columbia Circuit and the Eighth Circuit Courts of Appeals on these issues (*National Ass'n. of Reg. Util. Com'rs.* v. *F.C.C.*, 533 F. 2d 601 [D.C. Cir., 1976]; *Home Box Office, Inc.* v. *F.C.C.*, 567 F. 2d 9 [D.C. Cir., 1977]; and *Midwest Video Corp.* v. *F.C.C.*, —— F. 2d ——, [8th Cir., 1978], pet. for cert. filed, 46 U.S.L.W. 3710) as factually unrelated. (Appendix A at pp. 4-5a). On the procedural issue, the Second Circuit Court traced the alleged preemption back to the FCC's 1974 *Clarification, supra,* and concluded as follows:

> "That the FCC has, in fact, sought to preempt state and local price regulation of special pay cable programming is evident from a survey of FCC pronouncements in the area since 1974 . . .
>
> • • •
>
> "Finally, we do not believe that the FCC's choice to proceed by means of policy statements and interpretations rather than formal regulations vitiates its attempt to preempt. The policy to preempt has been shouted from the rooftops, *see Schwartz* v. *Texas,* 344 U.S. 199, 202-3 (1952), and the FCC has explicitly indicated

its intent that there be no price regulation whatever of the relevant area, *see Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767, 773-74 (1947)." (Appendix A at p. 6a).

Reasons for Granting the Writ

POINT I

The Federal Communications Commission exceeded its jurisdiction in purporting to preempt state and local price regulation of pay cable services.

The standard for FCC jurisdiction over cable television services is defined by the decisions of this Court in *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968), and *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972). In the absence of express statutory authority in this field, these decisions represent the sole bases for determining the limits of appropriate FCC regulatory actions. In the *Southwestern* case, this Court concluded, without expressing any view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes," that the Commission does have jurisdiction over cable television "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting . . ." 392 U.S. at 178.

The FCC's alleged preemption of pay cable rate regulation in the context of municipal franchising is clearly beyond the scope of this Court's standard. No *broadcast* regulatory goal could be used to justify such an intrusion upon the otherwise undisputed rights of local governments to control the use of their streets. Furthermore, the FCC has never attempted to interfere with the continuation of State and local rate regulation for the retransmission of broadcast signals by cable television systems, an area directly related to broadcasting. Thus, only aspects of cable

television which have little to do with broadcasting are regulated by the FCC's claimed preemption.

Even the liberal jurisdictional approach taken by this Court in the 1972 *Midwest Video* decision cannot justify the FCC's claimed preemption of local government rights. Previous cases before this Court were brought by private parties resisting federal regulation of their activities. In this case, petitioners make no effort to deny federal authority over broadcast related cable television activities, but rather to ask confirmation that such federal authority cannot, without further statutory support, usurp traditional franchise powers. That congress intended to protect the Constitutional rights of States and local governments to control their own streets is evident from the express limitations placed on FCC authority by the recently enacted amendments to the Communications Act relating to "pole attachments" (47 U.S.C. § 224), and from the more limited jurisdiction afforded to the FCC over non-broadcast carriers (*compare,* 47 U.S.C. § 152[b] and 47 U.S.C. § 301).

The fact that the FCC has the jurisdiction to regulate or authorize the operations of subscription television services providing similar programming, or to preempt and refrain from rate regulation of this *broadcast* service (*National Assoc. of Theatre Owners* v. *FCC,* 420 F. 2d 194 [D.C. Cir., 1969], *cert. den.* 397 U.S. 922 [1970]), can no more justify intrusion upon local rate regulation of franchised cable services than it could justify similar intrusion upon local rate regulation of any other non-broadcast entertainment service with a possible effect upon the market of subscription TV.

The mere goals, however laudatory, of program diversity or the growth of communications outlets are not sufficient to meet the test of broadcast television relevance set down in *Southwestern.* This was expressed clearly by the Eighth Circuit Court of Appeals in *Midwest Video Corp.* v. *F.C.C.,* —— F. 2d ——, Slip op. No. 76-1496 (8th Cir., February 27,

1978) pet. for cert. filed, 46 U.S.L.W. 3710. There, the Circuit Court, in ruling invalid the FCC's rules requiring access channels, stated as follows:

> "The standard established by the Supreme Court is 'reasonably ancillary;' not merely 'ancillary.' The standard is already broad, and the term 'reasonably,' requiring some nexus with the Commission's statutory responsibility, must not be read out of it. Nor can there be deleted what the Court said cable actions must be 'reasonably ancillary' *to, i.e.*, 'the effective performance of the Commission's various *responsibilities for the regulation of television broadcasting.*' 392 U.S. at 178 (emphasis added).
>
> • • •
>
> "Though neither *Southwestern* nor *Midwest Video* supports jurisdiction here, it is a 'reasonably ancillary' standard we apply, and it is the *1976 Report* rules we review. Each regulation of cable television must individually stand or fall, not on legal precedent concerning other regulations, but on whether or not the regulation under the review meets the standard established by the Court. The Commission reliance on *Southwestern* and *Midwest Video* ignores the indications in those cases that it has no sweeping jurisdiction over cable television, that whatever jurisdiction it may have is contingent upon its delegated powers, and that each attempt to regulate cable systems must be individually justified. *Nat'l. Ass'n. of Reg. Util. Comm'rs.* v. *FCC*, 533 F. 2d 601, 612 (D.C. Cir., 1976)." Slip op. No. 76-1946, pp. 25, 26.

A similar conclusion should be reached with regard to the preemption at issue in the instant case. To conclude otherwise would be to allow the FCC unfettered authority over any form of non-broadcast entertainment on the grounds that "outlets for expression" were involved.

The District of Columbia Court of Appeals has also expressed its view that FCC regulation of cable television is limited in nature. In *Home Box Office, Inc.* v. *FCC,* 567 F. 2d 9 (D.C. Cir., 1977), *cert. den.* 46 U.S.L.W. 3216 (October 3, 1977), the circuit court invalidated FCC regulations limiting the types of programs on pay cable services, resting its decision in large part upon the jurisdictional limits of the FCC. There, the Court stated, in part, as follows:

> ". . . and if judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television, *cf. Greater Boston Television Corp.* v. *FCC,* 143 U.S. App. D.C. 383, 394, 444 F. 2d 841, 852 (1970), *cert. den.* 403 U.S. 923 (1971)." 567 F. 2d at 28.

The decision of the District of Columbia Circuit Court in *National Ass'n. of Regulatory Utility Comm'rs.* v. *FCC,* 533 F. 2d 601 (D.C. Cir., 1976) is particularly relevant here because it involved an attempted FCC preemption of state regulation over cable television services. There the D.C. Circuit struck down the preemption and found that the FCC had no authority to regulate two-way, non-video, point-to-point, intra-state services. Although this decision dealt with cable television services that were clearly intra-state in nature, the jurisdictional comments of the Court are pertinent:

> "We are not persuaded that either the statute on its face or the construction which it has been given in *Southwestern* and *Midwest* supports the Commission's argument that it has a blanket jurisdiction over *all* activities which cable systems may carry on . . . The statute's introductory section is made a locus for

> powers which must of necessity be recognized if the purposes set out in the broadcasting sections are to receive their fullest realizations. The Court thus was not recognizing any sweeping authority over the entity as a whole, but was commanding that each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission's power over *broadcasting.*" 533 F. 2d at 612.

In discussing preemption under the Communications Act of 1934, this Court has stated:

> ". . . In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a Congressional design to preempt the field.' *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 134." *Head* v. *New Mexico Board,* 374 U.S. 424, 430 (1963).

In the area of pay cable, where the service provided is furnished to areas completely independent of each other physically and geographically by completely independent cable TV companies, a requirement of national rate uniformity is unrealistic. Regulation by local franchising, with the oversight of a state commission, is both logical and a recogntion of the legitimate interests that local governments have in their franchises.

The control of "pay cable" rates along with the basic rates was deemed necessary in order to avoid a variety of evils; e.g., it had been found that cable television companies had used "pay" rates to overcome adverse municipal action or basic rates. Clarification of Commission Policy, *supra,* Appendix E at p. 41a. Moreover, with

the increasing complexity of cable television program marketing arrangements, it has become impossible to clearly distinguish between those services once these services are identified as "pay" and "basic," respectively.

POINT II

The Federal Communications Commission failed to adopt the purported preemption in a procedurally proper manner.

The FCC's alleged preemption of State and local rate regulation of pay cable services can be found no earlier than its 1974 *Clarification of the Cable Television Rules and Notice of Proposed Rule Making and Inquiry in Docket Nos. 20018 et al., supra.* No prior notice was given of the FCC's intention to adopt this preemption, nor did that agency solicit comments on this action (although comments were invited on other actions, interpretations or proposed rule makings discussed in prospective terms in the same proceeding). These defects were not cured in any subsequent proceeding in which this preemption was discussed.

The adoption of this preemption should have been governed by the procedural standards of the Administrative Procedure Act, 5 U.S.C. § 553. Pursuant to § 553(b)(A), notice in the Federal Register need not be published for "interpretive rules" or "general statements of policy." However, the creation of the alleged preemption was neither merely interpretive nor a general statement of policy, but the making of a new rule of the first magnitude. In fact, this action also constituted a significant amendment of the existing rule, section 76.31(a)(4), *requiring* local approval for all regular subscriber rates. By adopting the preemption, the FCC redefined "regular" subscriber rates (as used in Section 76.31[a][4]) to mean something never previously supposed, and it ignored its own broad requirement, imposed by that section, that "No increases in rates charged to subscribers shall be made except as authorized by the franchising authority after an

appropriate public proceeding affording due process." Clearly a major new regulatory action was taken, but the method of its adoption was unconscionably unorthodox.

Although it is not alleged that the purported preemption, if jurisdictionally valid, necessarily had to be adopted by a formal amendment of the Code of Federal Regulations, some adequate notice and some opportunity for comment were required. *Home Box Office, Inc.* v. *F.C.C., supra.* Because the FCC held no hearings, nor took any evidence, prior to its decision to adopt its asserted preemption, the standard of review herein is whether this action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). It is not relevant to consider merely if the FCC's decision to preempt was "supported by substantial evidence," 5 U.S.C. § 706(2)(E). Considered by this standard, the FCC's action must fall, if only because it made no effort to determine factually whether the reasons for the proposed preemption were in any way justified. Vague references to "considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services" (*Clarification in Docket Nos. 20018 et al.,* 46 F.C.C. 2d 175, 199-200 [1974] are not sufficient to demonstrate a record of regulatory inquiry sufficient to justify an action of preemption. Without such an inquiry and such a record, the FCC's haphazard preemptive statements are procedurally defective and fatally so. *Home Box Office* v. *F.C.C., supra; Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 (1962); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971); *City of Chicago* v. *Federal Power Commission,* 458 F. 2d 731 (D.C. Cir., 1971), *cert. den.* 405 U.S. 1074 (1972).

As indicated above, the FCC has never provided a direct opportunity for the petitioners or any other parties to raise these objections, because no proceeding was ever addressed to this issue.

POINT III

The Rulings of the United States Court of Appeals for the Second Circuit on the FCC's cable television jurisdiction are in conflict with those of the District of Columbia and Eighth Circuit Courts of Appeals.

The United States Court of Appeals for the Second Circuit has held in this case that the jurisdiction of the Federal Communications Commission over the field of cable television is broad and lawful. In another case brought before that court by the petitioner, *New York State Commission on Cable Television* v. *F.C.C.*, —— F. 2d ——, Slip op. No. , p. (2d Cir., January 25, 1978), pet. for cert. filed 46 U.S.L.W. 86, an FCC limitation on the amount of fees or regulatory assessments that may be collected from franchised cable television operations by states and municipalities was upheld. The Petition for Certiorari to review this decision raises issues of FCC jurisdiction as well as regulatory process and interpretation.

As indicated, *supra*, p. 11, the Courts of Appeals for the District of Columbia Circuit and the Eighth Circuit have both issued rulings on the FCC cable jurisdiction which impose a much stricter standard than that adopted by the Second Circuit.

In consideration of the fact that FCC cable television jurisdiction rests entirely on the interpretive rulings of this Court, and in consideration of the substantial diversity of opinion amongst the federal courts and various governmental agencies, regarding the current implications of these rulings upon specific actions of the FCC, and in order to avoid a genuine conflict of federal law, as interpreted by various Circuit Courts, it is respectfully suggested that this honorable Court clarify the jurisdictional limits of the Federal Communications Commission in the field of cable television regulation.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Dated: New York, New York
June 27, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

CHARLES A. BRADLEY
Assistant Attorney General
of Counsel

APPENDIX A—Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 458, 482 September Term, 1977

Argued: March 8, 1978 Decided: March 29, 1978

Docket Nos. 77-6156, 77-6157

BROOKHAVEN CABLE TV, INC.; CAPITOL CABLEVISION, INC.; SAMSON CABLEVISION CORP.; TELEPROMPTER ELECTRONICS CORPORATION; WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NEW YORK STATE CABLE TELEVISION ASSOCIATION; and HOME BOX OFFICE, INC.,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Plaintiffs-Intervenors-Appellees,

—v—

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice Chairman; MICHAEL H. PENDERGAST; ELI WAGNER; and EDWARD J. WEGMAN, Commissioners of the NEW YORK STATE COMMISSION ON CABLE TELEVISION,

Defendants-Appellants,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Defendants-Intervenor-Appellant.

Appendix A.

Before: LUMBARD and OAKES, Circuit Judges, and WYZANSKI, District Judge.*

Appeal from declaration by the Northern District of New York, Port, *J.*, that New York State Commission on Cable Television's attempt to regulate rates charged for specialized pay cable programming was improper in light of FCC preemption, and from injunction against such regulation.

Affirmed.

LUMBARD, Circuit Judge:

This appeal raises two questions: whether the Federal Communications Commission has the authority to preempt state and local price regulation of one aspect of cable television—specialized programming for which a per-program or per-channel charge is made—and if so, whether the FCC has adequately and effectively exercised that authority. The Northern District of New York, Port, *J.*, finding that the FCC both possessed and had asserted the requisite authority, granted summary judgment to the plaintiffs herein, declaring that the action of the New York State Commission on Cable Television ["Commission"] seeking to impose price regulation on specialized pay cable was invalid, and enjoining defendants from attempting such regulation in the future. We affirm.

I

Plaintiffs are five cable television operators, two trade associations and Home Box Office, a supplier of special pay cable programming. In addition, Judge Port permitted the FCC and the United States to intervene as parties. The Commission and its members were joined as defendants by intervenor National Association of Regulatory Utility Commissioners ["NARUC"].

---

* Sitting by designation.

Appendix A.

This action was commenced in response to New York's scheme for regulating cable TV, N.Y. Exec. Law §§ 811-831 (McKinney's 1972-1977 Supp.) (article 28). The relevant portions of article 28 are set forth in the margin.[1] The provisions in dispute here concern the setting of rates by the state and local franchising authorities.

The sections concerning rates generated considerable confusion when promulgated in 1972, particularly with regard to special programming on cable systems. Accordingly, on March 1, 1976, the Commission issued a "Clarification of Commission Policy,"[2] which indicated (1) that no exemption or exclusion from franchising and rate approval requirements was intended for "pay," "auxiliary" or "subscription" cable services—the specialized programming at issue here; (2) that companies already providing pay cable services would not be required to amend their franchises immediately, but would have to give notice within two months to the appropriate authorities of their current rates, or face "appropriate sanctions"; and (3) that "active enforcement" of these policies would be undertaken.

Plaintiffs sought a declaration that the policies expressed in the Clarification violated the supremacy clause of the United States Constitution—because of alleged FCC preemption—as well as the first, fifth and fourteenth amendments. The district court granted summary judgment on the supremacy clause claim, and this appeal followed.

II

We hold that the FCC has the authority to preempt state and local price regulation of special pay cable programming; that it has exercised this authority; and that the means it has chosen to preempt state regulation are adequate and effective.

In United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968), the Supreme Court upheld the FCC's jurisdiction to regulate cable TV to the extent that such regulation

is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

The Court elaborated on and expanded this standard in United States v. Midwest Video Corp., 406 U.S. 649, 667-69 (1972), in which it approved the FCC's mandatory cable origination rules as "reasonably ancillary" to "the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and type of service." It follows that the FCC may regulate cable TV if its regulation will further a goal which it is entitled to pursue in the broadcast area.

A decision to delay all price regulation of special pay cable meets that test; a policy of permitting development free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity, and far less intrusive than the mandatory origination rules approved in *Midwest Video, supra. Cf.* National Association of Theater Owners v. FCC, 420 F.2d 194, 203 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970) (upholding FCC's non-regulation policy in subscription television field pending accumulation of expertise.)

Cases relied on by NARUC and the Commission are readily distinguished. In NARUC v. FCC, 533 F.2d 601 (D.C. Cir. 1976), the court ruled that there was no nexus shown between FCC preemption of regulation of two-way non-video leased access cable channels (used for such purposes as burglar alarms) and the goal of increasing program diversity. Here a connection has been shown.

Home Box Office, Inc. v. FCC, No. 76-1280 (D.C. Cir. March 25, 1977), *cert. denied,* 46 U.S.L.W. 3216 (U.S. Oct. 3, 1977) (Dkt. Nos. 76-1841 and -1842), overturned FCC anti-siphoning rules because of failure to demonstrate a genuine problem of siphoning broadcast programming.

Appendix A.

The FCC's regulatory goal in *HBO* was not program diversity, as here, but decreased competition.

Finally, Midwest Video Corp. v. FCC, No. 76-1496 (8th Cir. Feb. 27, 1978), held that the FCC's imposition of minimum public access and channel capacity standards on cable systems was improper. The court ruled that this was an attempt to do in the cable field something the FCC was specifically prohibited from doing in the broadcast area—imposing the burdens of common carriers. The far less intrusive 'regulation' proposed in the instant case is one which plainly eludes any attempt to analogize the regulation itself—rather than the underlying policy—to the broadcast area.

That the FCC has, in fact, sought to preempt state and local price regulation of special pay cable programming is evident from a survey of FCC pronouncements in the area since 1974:

> In Section 76.31(a)(4) [of 47 C.F.R.] we require that cable systems, in order to receive a certificate of compliance, must have a franchise providing for franchisor approval of initial charges for installation and regular subscriber service. We have intentionally and specifically limited rate regulation responsibilities to the area of regular subscriber service, and we will continue to do so. We have defined "regular subscriber service" as that service regularly provided to all subscribers. This would include all broadcast signal carriage and all our required access channels including origination programming. It does not include specialized programming for which a per-program or per-channel charge is made. The purpose of this rule was to clearly focus (sic) the regulatory responsibility for regular subscriber rates. It was not meant to promote rate regulation of any kind.
>
> After considerable study of the emerging cable industry and its prospects for introducing new and in-

> novative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services that have not yet developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development.

Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Docket Nos. 20018 et al., 46 F.C.C.2d 175, 199-200 (1974). *See First Report and Order in Docket No. 19554*, 52 F.C.C.2d 1, 68 (1975) ("Although we have not ourselves undertaken the regulation of rates for the sale of subscription programming, we regard our prior statements concerning the regulation of subscription operations as preempting local regulation of rates as well as program content."); *Notice of Inquiry in Docket No. 20767*, 58 F.C.C.2d 915 (1976).

Finally, we do not believe that the FCC's choice to proceed by means of policy statements and interpretations rather than formal regulations vitiates its attempt to preempt. The policy to preempt has been shouted from the rooftops, *see* Schwartz v. Texas, 344 U.S. 199, 202-03 (1952), and the FCC has explicitly indicated its intent that there be no price regulation whatever of the relevant area, *see* Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 773-74 (1947). The Commission and NARUC both participated in the 1974 proceedings cited above, and had ample opportunities to attempt to persuade the FCC to their point of view—which they did—and to take an appeal when they failed—which they did not.

Accordingly, we are satisfied that FCC preemption has rendered invalid New York's attempt to impose price regulation on special pay cable programming, and that the injunction was properly issued.

Affirmed.

Appendix A.

FOOTNOTES

[1]

§ 815. Duties of the commission

The commission shall:

(1) Develop and maintain a statewide plan for development of cable television services, setting forth the objectives which the commission deems to be of regional and state concern;

(2) to the extent permitted by, and not contrary to applicable federal law, rules and regulations:

(a) prescribe standards for procedures and practices which municipalities shall follow in granting franchises. . . .

(b) prescribe minimum standards for inclusion in franchises. . . .

. . . .

§ 819. Franchise requirement

1. Notwithstanding any other law, no cable television system, whether or not it is deemed to occupy or use a public thoroughfare, may commence operations or expand the area it serves after April first, nineteen hundred seventy-three unless it has been franchised by each municipality in which it proposes to provide or extend service.

2. A municipality shall have the power to require a franchise of any cable television system providing service within the municipality, notwithstanding that said cable television system does not occupy, use or in any way traverse a public street. The provision of any municipal charter or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises.

3. Nothing in this article shall be construed to prevent franchise requirements in excess of those prescribed by the commission, unless such requirement is inconsistent with this article or any regulation, policy or procedure of the commission.

. . . .

§ 825. Rates

1. Except as otherwise provided in this section, the rates charged by a cable television company shall be those specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories.

Appendix A.

2. Such rates may not be changed except by amendment of the franchise.

5. In addition to other powers, the commission may, after public notice and opportunity for hearing, prescribe rates for cable television service. . . .

[2] *In re* Rates Charged by Cable Television Companies for "Auxiliary" Programming, Docket No. 90010 (Commission on Cable Television 1976).

APPENDIX B—Decision of the United States District Court for the Northern District of New York.

BROOKHAVEN CABLE TV INC. et al., Plaintiffs,

United States of America and Federal Communications Commission, Intervenors-Plaintiffs,

v.

Robert F. KELLY, Chairman, et al., Defendants,

National Association of Regulatory Utility Commissioners, Intervenor-Defendant,

City of New York, Amicus Curiae.

No. 76-CV-154.

United States District Court, N. D. New York.

March 9, 1977.

MEMORANDUM-DECISION AND ORDER

PORT, Senior District Judge.

The plaintiffs and defendants have both moved for summary judgment on the first claim for relief asserted in the complaint. That claim challenges the right of the defendants, Commissioners of the New York State Commission on Cable Television (State Commission), to regulate the charges for pay cable TV on the ground that the matter has been preempted by the Federal Communications Commission.

The United States and the Federal Communications Commission were granted leave to intervene as parties plaintiff. The National Association of Regulatory Utility Commissioners was granted leave to intervene as a party defendant. The intervenors have joined in the motions

for summary judgment. The City of New York was granted leave to appear as amicus curiae in support of the defendants' motions.

The Parties

Five of the original plaintiffs (Brookhaven, Capitol, Samson, Teleprompter and Warner) are corporations which operate cable television systems in New York State. National Cable Television Association, Inc. (NCTA) and New York State Cable Television Association (NYCTA) are, respectively, national and state trade associations of cable television systems. The remaining plaintiff, Home Box Office (HBO), is an enterpirse which supplies pay cable programming to cable television systems both in New York and in other states. Plaintiff intervenors are the United States and the Federal Communications Commission (FCC).

The defendants are the five members of the New York State Commission on Cable Television. *See N.Y. Exec. Law* § 814 (McKinney Supp. 1975). Defendant intervenor, the National Association of Regulatory Utility Commissioners (NARUC), is a quasi-governmental, nonprofit organization whose membership includes governmental and regulatory bodies throughout the United States.[1]

Cable and Pay Cable TV

Cable TV essentially operates by retransmitting television signals to home viewers by cable, rather than by over-the-air broadcasting. When it originated, cable TV performed two basic functions. It enhanced reception of local television broadcasts, and it also permitted the im-

---

[1] The City of New York, appearing as *amicus curiae*, has briefed the court in support of the defendants' position that the FCC lacks jurisdiction to preempt pay cable TV.

portation of signals from distant television stations beyond the range of local reception.[2] Today, however, cable TV systems may also originate their own programming, which is called "cablecasting",[3] or may make available certain "access channels" over which individuals may transmit programming to home viewers.[4] Generally, cable TV systems provide these services to their subscribers for a basic monthly fee.[5]

Pay cable TV augments the basic cable service by providing the home viewer with additional programming for an additional monthly or other charge. The most common pay cable system provides the viewer with an additional channel for a flat monthly fee over the basic cable TV charge. The plaintiffs employ such a system. HBO supplies box-office type programming to local cable TV systems. This programming includes recent motion pictures, sports events not otherwise televised, and other entertainment, all shown without commercial interruption.[6] The local cable TV system then distributes this programming to pay cable home viewers over a channel which is accessible only to the pay cable subscribers. In order to receive HBO, the subscribers must pay a monthly fee in addition to the charge for their basic cable TV service.

Other pay cable systems are also being developed. Some systems provide the viewer with different programming options, e.g., sports programs or recent films, at different

---

[2] *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 163, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

[3] *See United States* v. *Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972).

[4] *See American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975).

[5] *See* Affidavit of Gerald M. Levin, ¶ 2 (dated April 29, 1976).

[6] *Id.* ¶¶ 3-5.

prices. Some systems charge the viewer only for those programs actually watched.[7]

The FCC'S Actions

By 1965, the FCC was involved in regulating the growing cable TV industry.[8] The agency's jurisdiction over this developing medium was first upheld by the Supreme Court in 1968.[9] In 1969, in an effort to encourage diversity of programming on cable TV, the FCC promulgated rules requiring cable TV systems having over a minimum number of subscribers to originate their own programming through cablecasting.[10] The Commission envisioned that some of this cablecasting would occur over leased access channels.[11] These are channels made available by the cable TV system, for a fee, to a third party who provides programming for home viewers. The FCC announced in 1971 that it had preempted the field of pay cable television cablecasting,[12] even though no comprehensive review of pay cable had yet been undertaken.

Having developed a policy of dual jurisdiction over cable TV rate regulation, the FCC in 1972 decided to permit local

---

[7] *See* Affidavit of James R. Hobson, ¶ 3 (dated June 4, 1976).

[8] *See Id.* ¶ 7.

[9] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

[10] *See* First Report and Order in Docket No. 18397, 20 F.C.C.2d 201 (October 20, 1969). These regulations were subsequently upheld by the Supreme Court in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 92 S..Ct. 1860, 32 L.Ed.2d 390 (1972).

[11] *See* First Report and Order in Docket No. 18397, 20 F.C.C.2d 201, 214 (October 24, 1969).

[12] "[T]he Commission has pre-empted the field of pay television cablecasting so that local franchise terms are inoperative and no further affirmative authorization is required." Request by Time-Life Broadcast, Inc., 31 F.C.C.2d 747 (September 8, 1971).

regulation of the rates for basic cable TV services only.[13] These are the services which the cable system regularly supplies to all subscribers. However, because the FCC wanted to encourage experimentation in the new medium of pay cable TV, and because it feared that both federal and local regulation would be confusing and impracticable, the Com mission at that time precluded local rate regulation for pay cable TV.[14] The FCC's position and its reasoning were stated much more clearly in a subsequent clarification in 1974.

> It remains our intent to keep [leased access] channels as free as possible from any regulation that might restrict or artificially alter their growth. This is particularly true in the area of rate regulation. We have pre-empted this area with the explicit purpose of allowing the market place to function freely.
>
> We have intentionally and specifically limited rate regulation responsibilities to the area of regular subscriber service, and we will continue to do so. We have defined "regular subscriber service" as that service regularly provided to all subscribers. This would include all broadcast signal carriage and all our required access channels including origination programming. It does not include specialized programming for which a per-program or per-channel charge is made. The purpose of this rule was to clearly focus the regulatory responsibility for regular subscriber rates. It was not meant to promote rate regulation of any other kind.
>
> 85. After considerable study of the emerging cable industry and its prospects for introducing new and in-

---

[13] Cable Television Report and Order, Docket Nos. 18397 et al., 36 F.C.C.2d 143, 209 (February 3, 1972).

[14] *Id.* at 193.

> novative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services that have not yet developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development. This is precisely what we are trying to avoid.[15]

Noting that conventional TV's dependence on advertising and its limited broadcast spectrum confined its programming to mass appeal, the FCC in 1975 further explicated the need for its policy.

> Since conventional television often cannot, because of its nature, cater to minority tastes and interests, we encourage the development of new technologies which promise viewing diversity. Subscription television promises to bring both diversity of programming and diversity of format to those who are willing to pay a direct charge for the service. Neither STV nor cable television must attract advertiser support with programming having a broad mass appeal. Cable television, with its abundant channel capacity, is particularly able to program for audiences with specialized interests. Subscription television's potential to expand the public's program choices, to supplement the programming now provided by conventional television, gives it an important role to play in our national communications structure.[16]

---

[15] Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 175, 185, 199-200 (April 17, 1974).

[16] First Report and Order in Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 43 (April 4, 1975).

Appendix B.

Once again, in the spring of 1976, the FCC emphasized its position. "[T]he Commission has not only declined to regulate the rates for these services [including pay cable] but has preempted their regulation by state and local authorities."[17]

The State's Actions

In 1972, the New York State Commission on Cable Television (State Commission) was created. *N.Y. Exec. Law* §§ 811-31 (McKinney Supp. 1975). The State Commission was given rather broad powers to regulate cable TV within New York, *see e.g., Id.* §§ 816, 824, including the power to regulate the rates charged by cable TV systems. *Id.* §§ 822, 825. Nowhere within the State Commission's enabling legislation is any distinction drawn between basic cable TV service and pay cable TV. The state statutes require that rates charged by a cable TV company be specified in the company's franchise, *Id.* § 825(1), and that rates not be changed except by amendment of the franchise. *Id.* § 825(2). Furthermore, any franchise amendment requires the approval of the State Commission. *Id.* § 822(1). Thus, any change in the rates charged for cable TV service requires the State Commission's approval.

In March of 1976, the State Commission issued a Clarification of Commission Policy, Rates Charged by Cable Television Companies for "Auxiliary" Programming, Docket No. 90010 (March 1, 1976) (Clarification).[18] In its Clarification, the State Commission asserted its authority to regulate the rates charged for pay cable TV. It disputed the FCC's jurisdiction over such regulation and further dis-

---

[17] Notice of Inquiry in Docket No. 20767, F.C.C. 76-314, —— F.C.C.2d —— (April 2, 1976) at 2.

[18] The Clarification has been attached to the state defendants' motion papers. Affidavit of Kenneth J. Connolly, Exh. 1 (dated May 5, 1976).

puted the FCC's contention that pay cable rate regulation had, in fact, been federally preempted. The State Commission expressed concern that, due to the FCC's position, many New York cable TV companies were not complying with the requirements of the New York Executive Law. In particular, they were allegedly refusing to file their rates for pay cable TV, although they did so for basic cable TV. Many companies supposedly instituted HBO service without specifying the rates charged in their franchise. The State Commission also claimed that various abuses were occurring concerning the fees charged for pay cable TV.[19]

The Clarification concluded with a specific ruling that pay cable TV services were not exempt from the requirements of Section 825 of the Executive Law. In lieu of formal amendment of their charters "at this time", the State Commission required all cable TV companies providing pay cable services to file a notice of the nature of their pay cable services along with the rates charged, or else face appropriate sanction. Finally, the State Commission states that active enforcement of all these policies will be undertaken.

[1] Plaintiffs then commenced this action, claiming that the State's Clarification violates orders of the FCC in an area specifically preempted by the FCC. Plaintiffs request a judgment declaring the State's attempt to regulate pay cable TV void and enjoining such regulation.[20]

---

[19] For example, the State Commission alleges that some companies, when refused rate increases for basic cable TV services, have unilaterally raised their pay cable TV fees.

[20] Plaintiffs' complaint alleges federal jurisdiction under a variety of statutes: 28 U.S.C. §§ 1331, 1337, 1343(3), 2201; 47 U.S.C. § 401(b). It seems abundantly clear that this suit arises under the Federal Communications Act, 47 U.S.C. § 151 et seq. Jurisdiction is, therefore, based on 28 U.S.C. § 1337. *See Post*

(footnote continued on following page)

Appendix B.

Contentions

The plaintiffs simply contend that the State Commission's Clarification constitutes price regulation of pay cable TV which has been prohibited and preempted by the FCC.

Defendants take the position that the State Commission's action does not attempt to regulate the charges for pay cable, that the FCC's action does not effect preemption, and the FCC lacks jurisdiction to preempt.

In addition, the defendants seek judgment in their favor because of an asserted lack of a case or controversy, because of mootness, and plaintiffs' lack of standing.

Because these last claims are without substance, and because the FCC has the power and has preempted the right to control pay cable charges, judgment should be granted in favor of the plaintiffs.

Issue

[2] The real issue simmers down to: Whether jurisdiction over pay cable rates is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting"? *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968).

Power to Regulate Cable TV

The FCC's authority to regulate cable TV has been upheld by the Supreme Court on two occasions. The first case arose out of an agency rule which forbade a cable

---

(footnote continued from preceding page)

v. *Payton*, 323 F.Supp. 799 (E.D.N.Y.1971). The per se inter interstate nature of cable TV has been noted elsewhere. *National Association of Regulatory Utility Commissioners* v. *FCC*, 174 U.S.App.D.C. 374, 533 F.2d 601, 621 (1976) (Lumbard, J., concurring). There is no need to consider the other alleged jurisdictional grounds.

TV system from importing distant television signals into any of the nation's 100 largest television markets. Southwestern Cable Company sought to bring distant (Los Angeles) signals to its cable subscribers in San Diego, one of the 100 largest markets. At the request of a third party, the FCC ordered Southwestern to halt this proposed expansion of its services. The Supreme Court upheld the Commission's authority. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968). The Court found this authority in the general language and purpose of the Federal Communications Act. 47 U.S.C. §§ 151, 152(a). However, without specifically detailing the limits of the FCC's power, the Court noted that such authority is "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968).

Four years later, the Court further illuminated the contours of its "reasonably ancillary" test. The FCC had promulgated rules requiring cable systems with a certain minimum number of subscribers to originate some programs. A cable system subject to the new rules challenged the FCC's authority to issue them, and the agency's power was again upheld. *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972). The Court's inquiry focused on whether the program-origination rules were "reasonably ancillary" to the performance of the FCC's responsibilities for regulating TV broadcasting. *Id.* at 663, 92 S.Ct. 1860. Holding in the affirmative, the Court noted that "the Commission's legitimate concern in the regulation of CATV [cable TV] is not limited to controlling the competitive impact CATV may have on broadcast services . . . but extends also to requiring CATV affirm-

atively to further statutory policies." *Id.* at 664, 92 S.Ct. at 1869.[21] The Court also stated that, merely because the cablecasts would be transmitted without use of the broadcast spectrum, the regulation was no less ancillary to the FCC's jurisdiction over broadcast services. *Id.* at 669, 92 S.Ct. 1860. Emphasis was placed on the rule's effect of providing home viewers with "suitably diversified programming." *Id.* With the distinction between protection and promotion and that between broadcasting and cablecasting set aside, the Court's inquiry became much simpler.

> [T]he critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . ." (citation omitted) We find that it has.

Id. at 667-68, 92 S.Ct. at 1870.

Reasonably Ancillary?

[3] The FCC has found that pay cable TV increases programming diversity,[22] an objective which has specifically been held to be reasonably ancillary to the FCC's responsibilities over broadcasting. *United States* v. *Midwest Video Corp., supra,* 406 U.S. at 667-68, 92 S.Ct. 1860, 32 L.Ed.2d 390. Pay cable TV's capability to satisfy minority

---

[21] In short, the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting. *United States* v. *Midwest Video Corp.,* 406 U.S. 649, 667, 92 S.Ct. 1860, 1870 (1972).

[22] *See* note 16 and accompanying text *supra.*

tastes which are ordinarily overlooked by conventional television[23] enhances and fortifies this objective.

In furtherance of program diversification and applying the "reasonably ancillary" test, the Ninth Circuit has upheld the FCC's power to regulate access channels, including leased access channels. *American Civil Liberties Union* v. *FCC,* 523 F.2d 1344 (9th Cir. 1975).

Defendants rely heavily on *National Association of Regulatory Utility Commissioners* v. *FCC,* 174 U.S.App. D.C. 374, 533 F.2d 601 (1976) (NARUC), which limited the FCC's reasonably ancillary powers. *NARUC* held that the FCC could not preempt state regulation of the use of cable TV leased access channels for two-way non-video communications such as surveys and burglar alarms.[24] The *NARUC* court reached its result in spite of defining "ancillary to broadcasting" broadly.

> *Midwest,* without question, takes a giant step beyond *Southwestern,* in relaxing the nature of the ancillariness necessary to support an assertion of Commission power over cable. As we read the case, it turns upon a determination that "ancillary to broadcasting" means not only "for the protection of broadcasting," but also embodies any regulation of cable which in its own right serves the purposes pursued by broadcast regulation. Since a prime purpose in the area of broadcast regulation is the assurance of variety in what appears on the home viewer's screen, the Court concluded that an origination requirement aimed at providing "suitably diversified programming," is within the ancillariness standard.

---

[23] *Id.*

[24] *National Association of Regulatory Utility Commissioners* v. *FCC,* 174 U.S.App.D.C. 374, 533 F.2d 601, 610 n. 44 (1976) (NARUC).

Id. at 615 (footnotes omitted). *NARUC* concluded that non-video return signals[25] from the viewer to the cable TV system had no relation to the FCC's power over broadcasting. These signals were private in nature and, in fact, had nothing to do with broadcasting. The court contrasted cable programs which, to the home viewer, are indistinguishable from broadcasts, even though they are transmitted by cable and not over the air. *Id.* at 615-16. Although *NARUC* did limit the FCC's powers, that limit was placed well beyond the FCC's present attempts to regulate pay cable TV.[26]

The nexus between broadcasting purposes and "leased access channels for two-way, point-to-point, non-video communications"[27] which was found to be so patently missing in *NARUC* is obviously present in pay cable TV.

The FCC has determined that rates for pay cable TV should be set by marketplace forces and not regulated by state or local authorities. The rationale behind this decision is simply that rate regulation can be expected to chill development of the new medium, whereas a free market environment should enable it to grow. Since the FCC has also determined that pay cable TV will increase programming diversity, it follows that efforts to nurture and

---

[25] The court specifically limited its consideration to "non-video return transmissions", and did not consider return video signals because of the latter's present economic and technological unfeasibility. NARUC, *supra*, at 605 n.1.

[26] Judge Wilkey's opinion for the court ruled on an alternative ground—that these systems were really carriers and, because they were intrastate as well, they were specifically excluded from the FCC's purview by 47 U.S.C. § 152(b). However, NARUC was decided by a 2-1 vote, with Judge Lumbard of the Second Circuit concurring, and Judge Skelly Wright dissenting. Judge Lumbard's opinion deals only with the "reasonably ancillary" question and does not reach the issue raised by 47 U.S.C. § 152(b).

[27] NARUC, *supra*, at 605.

protect this infant medium will, likewise, result in an increase in programming variety. This same rationale supported an earlier decision of the FCC to preclude rate regulation of another infant medium, subscription television (STV).[28] *National Association of Theatre Owners* v. *FCC*, 136 U.S.App.D.C. 352, 420 F.2d 194 (D.C.Cir.1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 914, 25 L.Ed.2d 102 (1970) (NATO). *NATO* upheld the FCC's jurisdiction over rate regulation for STV. More recently, the Ninth Circuit has affirmed the FCC's jurisdiction to regulate the rates for cable TV access channels, including those for leased access channels. *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975).

Defendants argue that rate regulation of pay cable TV transcends the limits of the FCC's "ancillary" jurisdiction. In *Midwest Video*, the Supreme Court upheld the FCC's cablecasting requirements by a 5-4 vote, with Chief Justice Burger casting the deciding vote. In his concurring opinion, the Chief Justice stated his belief that "the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 676, 92 S.Ct. 1860, 1874, 32 L.Ed.2d 390 (1972) (Burger, C. J., concurring). Relying on the language of the Chief Justice, defendants argue that the present attempt to rate regulate pay cable TV exceeds these "outer limits". However, if a cable TV system can be "drafted against [its] will to become a broadcaster" 406 U.S. at 680, 92 S.Ct. at 1876 (Douglas, J., dissenting), and still be within the "outer limits", it is hard to see how permitting free play in the great variety of pay TV programs can be outside those limits.

Head v. *New Mexico Board of Examiners*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) and *TV Pix, Inc.* v.

---

[28] STV is pay over-the-air television.

Taylor, 304 F.Supp. 459 (D.Nev. 1968), *aff'd,* 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed.2d 746 (1970), cited by defendants are inapposite. On an analysis of the facts in those cases, the Court merely found that the Commission had not, in fact, exercised its power to preempt. In this case, the preemption or, as stated by the defendants' clarification, the "purported preemption of the field", is virtually conceded. The defendants, however, "fail to agree with the legality of the FCC's preemptive policy".

The state defendants argue that their actions are merely concerned with franchising. Since the power to franchise is a state power, delegable to localities, the FCC allegedly cannot preempt this area.[29] Defendants have overstated their case. The FCC has developed a policy of dual jurisdiction over cable TV, with responsibilities divided between the Commission and state and local governments. *See National Cable Television Association* v. *United States,* 415 U.S. 336, 339, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974). Specifically, the FCC has concluded that local franchising of cable TV systems is preferable to a scheme of federal licensing.[30] Also, rate regulation of basic cable TV services has been delegated to the states.[31] On the other hand, the FCC has consistently precluded local rate regulation of pay cable

---

[29] In support of this assertion, the state defendants cite two old Supreme Court cases. *Russell* v. *Sebastian,* 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912 (1914); *City of Owensboro* v. *Cumberland Telephone & Telegraph Co.,* 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389 (1913). However, neither of these cases deal with federal preemption nor do they involve problems of conflicting state and federal powers. They concern the protection of property rights acquired by utility companies prior to the development of franchising systems.

[30] Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115, 136 (August 5, 1971); *see* 47 C.F.R. § 76.31 (1975).

[31] *See* notes 13 to 15 and accompanying text, *supra.*

TV.[32] The state defendants' present actions go beyond mere franchising; they attempt to regulate the rates charged for pay cable TV in clear conflict with federal policy. Although defendants argue that their actions are authorized by their enabling legislation, *N.Y. Exec. Law* §§ 811-31 (McKinney Supp.1975), this very statute contradicts their assertion of authority independent of the FCC. One of the enumerated legislative findings therein is a need "to promote the rapid development of the cable television industry responsive to community and public interest and *consonant with policies, regulations and statutes of the federal government* . . . ." *Id.* § 811 (emphasis added).

Ripeness, Mootness, Standing

The defendants' claims of ripeness, mootness and standing can be disposed of with little discussion.

[4-6] The defendants' Clarification[33] of Commission policy makes it abundantly clear that it is the Commission's policy to require cable TV companies in New York to specify in the franchise the rates for "auxiliary programming" as well as "rates for . . . regular subscriber services". The Clarification further recognizes the "growing popularity of the 'home box office' programming service". The Clarification then acknowledges that cable TV services have failed to file the rates for cable pay TV, a practice which was "attributable to the Federal Communications

---

[32] Notice of Inquiry in Docket No. 20767, FCC 76-314, —— F.C.C.2d —— (April 2, 1976); First Report and Order in Docket Nos. 19554 and 18893, 52 F.C.C.2d 1 (April 4, 1975); Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 175 (April 17, 1974); Cable Television Report and Order, Docket Nos. 18397, et al., 36 F.C.C.2d 143 (February 3, 1972); Request by Time-Life Broadcast, Inc., 31 F.C.C.2d 747 (September 8, 1971).

[33] See note 18 *supra.*

Commission's position that state and local governments may not involve themselves in the regulation of subscriber rates for cable television services other than those described above as 'regular' or 'basic'."[34] The Clarification then goes on to state that, because the preemption policy of the Commission has not been tested in a court, it will insist on the filing as required under its Clarification. Thus, although inviting a court test, it now, given the opportunity, seeks to avoid it.[35] For noncompliance, it threatens enforcement. In short, it prefers the threat to the test.

Although it has not required the plaintiffs presently supplying pay cable TV service to amend their charter, "at this time", no assurance is given of when such amendment might be required. The necessary long term and substantial commitments required for the development of pay cable TV are not likely to be undertaken while "waiting for the other shoe to drop".

Under these circumstances, the test for ripeness is met. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

Abbott Laboratories, supra, established a two-part test for determining the ripeness of an action. The test requires the district courts to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). The factors which led the Court to find that case fit for judicial decision are all present here. First, this action involves purely legal questions, essentially whether the FCC has jurisdiction to pre-

---

[34] *Id.*

[35] It should be noted that New York could have contested the FCC's preemption of pay cable TV rate regulation without forcing plaintiffs to bring this suit. The FCC's decision was reviewable in the Courts of Appeals pursuant to 28 U.S.C. § 2342.

empt pay cable TV rate regulation. Secondly, the Clarification issued by the State Commission possesses the requisite finality. It is not an informal statement, nor is it the ruling of a subordinate administrative officer. Rather, it is a ruling by the five-member state commission which has jurisdiction to regulate cable TV in New York. Finally, the Clarification is effective upon publication. It demands compliance within two months, threatens sanctions, and promises active enforcement of its rulings.

The second prong of the ripeness test considers the harm caused to the plaintiffs by withholding judicial review. In *Abbott Laboratories, supra,* plaintiffs were forced to comply or else to face civil and criminal sanctions. Here, although the threat of sanction is not as ominous, and the required filing not as onerous, the mere issuance of the Clarification has adversely affected all plaintiffs. Because cable TV is a capital intensive enterprise, cable systems which want to begin pay cable operations have been deterred from doing so by the threat of rate regulation.[36] Existing pay cable systems are deterred from expanding geographically.[37] Also, since the issuance of the Clarification, HBO has been severely hampered in its efforts to obtain new affiliates in New York State.[38] These facts are unlike those in *Daley* v. *Mathews,* 536 F.2d 519 (2d Cir. 1976), *cert. denied sub nom., Daley* v. *Califano,* —— U.S. ——, 97 S.Ct. 1548, 51 L.Ed.2d 773 (1977), where the Second Circuit recently affirmed a dismissal for want of ripeness. In contrast to the "tentative possibility of future inspection" *Id.* at 522, present in *Daley, supra,* the hard-

[36] *See* Affidavit of Stuart Feldstein, ¶ 2 (dated June 10, 1976). *See also* affidavit of James R. Hobson, ¶ 12 (dated June 4, 1976).

[37] *See* Affidavit of Stuart Feldstein, ¶ 6 (dated June 10, 1976).

[38] Affidavit of Bruce P. Sawyer, ¶ 4 (dated June 11, 1976).

ship to the plaintiffs herein is present and real.[39] The action is ripe for judicial review.

Mootness

[7] Little need be said concerning defendants' claim of mootness as to four of the plaintiff TV systems which have filed with reference to pay cable TV. No claim is made that the case has been mooted as to the fifth cable TV plaintiff. In addition, the four filing plaintiffs filed under protest. The threat of having to amend their franchises and obtain the approval of the State Commission at any time subject to sanctions for failure is bound to affect adversely the stations filing under protest.[40] As indicated previously, making long range plans is impractical while "waiting for the other shoe to drop". In addition, mootness is not raised as to the intervening plaintiffs.

Standing

[8] Both NCTA and NYCTA, whose standing is attacked, clearly represent members adversely affected by the defendants' action. They, as well as HBO, whose pecuniary interest is clearly involved, have standing.[41]

---

[39] Furthermore, the FCC has intervened as a party-plaintiff in this action. That agency, which was created "to make available a rapid, efficient, Nation-wide, and world-wide wire and radio communication service", 47 U.S.C. § 151, has a very real interest in preventing New York from regulating areas within the sphere of federal control.

[40] *See Begins* v. *Philbrook*, 513 F.2d 19 (2d Cir. 1975).

[41] "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club* v. *Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972). *See also New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York,*

(footnote continued on following page)

For the reasons herein, the motion of the plaintiffs for summary judgment on the first claim in the complaint should be granted. The plaintiffs are to prepare a judgment to be agreed upon and submitted to me for signature. If the parties are unable to agree, judgment may be settled on three days notice.

SO ORDERED.

(footnote continued from preceding page)

516 F.2d 350 (2d Cir. 1975). In fact, one of these plaintiff organizations, NCTA, has represented its members in similar federal litigation. *See, e. g., National Cable Television Association, Inc.* v. *United States,* 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974).

APPENDIX C—Judgment of the United States District Court for the Northern District of New York.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

76-CV-154

FINAL JUDGMENT

BROOKHAVEN CABLE TV INC.; CAPITOL CABLEVISION INC.; SAMSON CABLEVISION CORP.; TELEPROMPTER CABLE SYSTEMS, INC.; WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NEW YORK STATE CABLE TELEVISION ASSOCIATION, and HOME BOX OFFICE, INC.,

Plaintiffs,

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Intervenors-Plaintiffs,

—against—

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice Chairman; MICHAEL H. PRENDERGAST; ELI WAGNER; and EDWARD J. WEGMAN, Commissioners of the NEW YORK STATE COMMISSION ON CABLE TELEVISION,

Defendants,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Intervenor-Defendant,

CITY OF NEW YORK,

Amicus Curiae.

Appendix C.

Pursuant to the Memorandum Decision and Order of this Court dated March 9, 1977, granting plaintiffs' motion for summary judgment on the first claim in the complaint:

A. It is hereby ordered, declared, adjudged and decreed:

1. The Federal Communications Commission ("FCC") has the authority and jurisdiction to preempt the regulation of pay cable rates and to prohibit state and local governments from regulating such rates;*

2. The FCC has validly preempted the regulation of pay cable rates and prohibited state and local governmental regulation of such rates;

3. Neither the State of New York nor any instrumentality thereof nor any locality therein has the authority to regulate pay cable rates;

4. Attempts by the New York State Commission on Cable Television ("State Commission"), including its Clarification of Policy dated March 1, 1976, to require cable television companies to file their pay cable rates and changes therein with the State Commission other than for purely informational purposes and to require such companies to specify said rates and changes in their franchises and to require such companies to obtain consent of the franchising locality and the State Commission for such rates and any changes therein are null and void; and

5. Pay cable rates may be determined and changed by any cable television company without the consent of any franchising locality or the State Commission.

---

* Pay cable rates refer to per-channel and per-program charges for programs and services offered by cable television systems in addition to basic cable television services (i.e., the carriage of television signals and origination of access and other programs for which there is no separate charge in addition to the regular fee charged to all subscribers).

Appendix C.

B. Defendants, their agents, employees and all persons in active concert and participation with them are hereby permanently enjoined and restrained from directly or indirectly:

1. Regulating or attempting to regulate pay cable rates in any manner;

2. Requiring or attempting to require cable television companies to specify their pay cable rates in their franchises, or requiring or attempting to require approval of such rates or changes by the State Commission or local franchising authority; and

3. Commencing any judicial, administrative or other proceedings or applying or threatening to apply any sanctions against any plaintiff or any cable television company for imposing or changing any pay cable rates without specifying any such rates or changes in its franchise, or without obtaining the approval of the State Commission or of any local franchising authority.

C. It is further ordered, adjudged and decreed that jurisdiction is retained by this Court for the purpose of enabling any of the parties to apply for such further relief as may be necessary or appropriate for the effectuation of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of violations thereof.

D. The Clerk is directed to make entry of final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

Dated: May 11, 1977

EDMUND PORT
United States District Judge

APPENDIX D—Statement of Commission Policy, Rates Charged by Cable Television for Subscription Programming.

STATE OF NEW YORK

COMMISSION ON CABLE TELEVISION

In the Matter of

Rates Charged By Cable Television Companies
for Subscription Programming

STATEMENT OF POLICY

(Issued: October 19, 1973)

Subdivisions 1 and 2 of Section 825 of the Executive Law provide as follows:

> 1. Except as otherwise provided in this section, the rates charged by a cable television company shall be those specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories.
>
> 2. Such rates may not be changed except by amendment of the franchise.

Subdivision 1 of Section 822 of the Executive Law provides as follows:

> No . . . amendment of any franchise . . . shall be effective without the prior approval of the commission. . . .

We have this day issued an order granting an application by TelePrompTer County Cable TV Corporation for ap-

proval of a franchise amendment setting forth the rate at which subscription programming will be made available by TelePrompTer in the City of Mt. Vernon. In the course of our review of the TelePrompTer application, it has come to our attention that other cable television companies in the state are either presently offering subscription programming for which a charge is made or intend to do so in the near future. In a number of instances of which we are aware, the franchises under which these companies operate do not set forth the rate at which such programming is being, or will be, made available. Apparently, many cable television companies are either unaware of the requirements of Sections 822 and 825 or uncertain as to their applicability to the rates for subscription programming.

We have made clear in the *TelePrompTer* case that we believe this Commission's jurisdiction under Sections 822 and 825 of the Executive Law extends to the rates for subscription programming offered by cable television companies.

In *TelePrompTer,* we sought and obtained a judicial order prohibiting the company from charging for subscription programming prior to Commission approval of a franchise amendment specifying the rate for such service. However, the circumstances of that case were, in our view, quite unique,* and we have concluded that the public in-

---

* In *TelePrompTer,* we were faced with a situation in which the company first applied for our approval of a franchise amendment and then withdrew the application, claiming "pre-emption," when we failed to take action in accordance with the company's apparent timetable. In these circumstances, there could be no basis for any claim that the company was unaware of the requirements of the statute. And, having initially resolved any uncertainty as to the applicability of these requirements in favor of Commission jurisdiction, the company's subsequent resort to the pre-emption argument had a somewhat hollow ring.

terest would not be served by a similar approach in all cases. Accordingly, we will not, as a general matter, institute legal proceedings to enjoin cable television companies that are presently engaged in subscription programming, or that are planning to engage in such programming prior to December 1, 1973, from charging for such programming if the cable television company notifies the Commission, in writing by not later than October 29, 1973

(1) of the material facts concerning each such existing or proposed operation (including, at least, the name of the program supplier, the municipalities to be served, the rate for such service and the date service commenced or will commence *and*

(2) that it will promptly, and with due diligence, take whatever measures are necessary to satisfy the requirements of Sections 822 and 825 of the Executive Law.

Cable television companies who avail themselves of this procedure will, of course, be expected to in fact use due diligence to satisfy these regulatory requirements. The Commission will review all Section 822 applications filed in accordance with this policy statement, and our disposition of those applications will be governed by the provisions of that section.

Any cable television company intending to engage in subscription programming as to which the notification procedure described above either is inapplicable or has not been followed must comply with the requirements of Sections 822 and 825 prior to demanding, exacting, or collecting any charge for such programming.

Commissioners participating: Robert F. Kelly, Chairman; Jerry A. Danzig, Vice Chairman; Eli Wager, Edward Wegman, Michael H. Prendergast, Commissioners.

APPENDIX E—Clarification of Commission Policy, *In Re* Rates Charged by Cable Television Companies for "Auxiliary" Programming.

STATE OF NEW YORK

COMMISSION ON CABLE TELEVISION

Docket No. 90010

In the Matter of

Rates Charged by Cable Television Companies for "Auxiliary" Programming

CLARIFICATION OF COMMISSION POLICY
(Issued: March 1, 1976)

For the reasons hereafter described, we are today clarifying our policy regarding the regulation of subscriber rates for cable television services. In particular, we wish to make clear that Article 28 of the Executive Law requires that all rates charged to subscribers by cable television companies in New York must be specified in the cable television franchise held by the cable operator. This requirement applies not only to rates for such regular subscriber services as the transmission of television and radio broadcast signals and non-broadcast access and origination programming, but also to the rates for auxiliary programming such as that provided for an additional per-channel charge.

LEGAL CONTEXT

Section 825 of the Executive Law provides, in part, as follows:

> 1. Except as otherwise provided in this section, the rates charged by a cable television company shall be

those specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories.

2. Such rates may not be changed except by amendment of the franchise.

Section 822 of the Executive Law provides, in part, as follows:

1. No transfer, renewal or amendment of any franchise . . . shall be effective without the prior approval of the commission.

Although these provisions, by their terms, apply to all rates charged by a cable television company, it has been the practice of many cable television companies to comply with Sections 822 and 825 with regard to their rates for "basic" subscriber services (*i.e.*, the transmission of television and radio broadcast signals and access and origination programming) while avoiding these same provisions with regard to their rates for specialized programming sold to their subscribers on a per-channel basis. The extent of this practice is not now known with precision, but the growing popularity of the "Home Box Office" programming service has made the practice increasingly more widespread in recent years.*

The view that rates for subscription programming are excluded from the requirements of Section 825 is at-

---

* In March 1973 only 16,100 subscribers in New York State received "pay cable" services. By November 1975 approximately 142,500 subscribers were receiving "pay" cable services. Of these almost 139,000 were subscribers to the Home Box Office programming package.

tributable to the Federal Communications Commission's position that state and local governments may not involve themselves in the regulation of subscriber rates for cable television services other than those described above as "regular" or "basic." See, *e.g.*, paragraph 84 of the *Clarification of Cable Television Rules*, FCC 74-384, 46 FCC 2d 175, 29, RR 2d 1621 (1974); paragraph 216 of the *First Report and Order in Docket Nos. 19554 and 18893*, FCC 75-369, 52 FCC 2d 1, 33 RR 2d 367 (1975). The FCC asserts that it has lawfully pre-empted all regulation in this area pursuant to its authority under the supremacy clause of the United States Constitution** and its mandate to regulate broadcast communications under the Communications Act.*** This preemption it is argued, nullifies any law or franchise agreement to the contrary. The FCC's assertions in this matter have never been tested in a court of law.**** However, as a result of the FCC's position, many cable television companies and many municipalities in New York have been confused with regard to the authority of local governments to deal with the rates of "pay cable" services.

** "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the conrary notwithstanding." U.S. Const., art. VI, cl. 2.

*** Communications Act of 1934, as amended.

**** The United States Supreme Court has upheld the FCC's authority to regulate the field of cable television in a manner "ancillary" to its regulation of broadcasting. *United States* v. *Midwest Video*, 406 U.S. 649 (1972); *United States* v. *Southwestern Cable*, 392 U.S. 157 (1968). Neither of these cases dealt with the subject at hand and both pre-date the FCC's current cable regulations. In *TV Pix, Inc.* v. *Taylor*, 304 F. Supp. 459 (D.C. Nev., 1968), *aff'd per curiam*, 396 U.S. 556 (1969), the FCC's right of pre-emption was supported, but this case, too, did not rule on the question of rate regulation.

Appendix E.

EARLY COMMISSION ACTIVITY

The problem of "pay cable" regulation is not a new one. In September, 1973, TelePrompTer County Cable TV Corporation ("TPT") attempted to establish subscriber rates for Home Box Office service at Mount Vernon, New York. Following applicable law, it sought to do so by means of an amendment to its franchise and approval of that amendment from us. TPT's application was opposed by a number of motion picture theatre associations in connection with their requests for rule making in the general area of "pay" programming.* TPT subsequently withdrew its application, claiming that the FCC preemption relieved it of the requirement of local or State approval of "pay cable" rates.

On October 1, 1973, we obtained an Order from the Supreme Court, Albany County, restraining TelePrompTer from imposing any charge for subscription programming in Mount Vernon until we had approved such charge in accordance with the requirements of Sections 822 and 825 of the Executive Law. TelePrompTer thereafter requested once again that we approve its "pay cable" rate, and, on October 19, 1973 we granted such approval.**

On the day we issued our Order in *TelePrompTer,* October 19, 1973, we also issued a Statement of Policy regarding "Rates charged by Cable Television Companies for Subscription Programming." In that statement, we indicated our recognition of the problems presented in this area and we reasserted our authority, pursuant to Sections

---

* Note petitions of National Association of Theatre Owners, Inc. (NATO), the Metropolitan Motion Picture Theatre Association and the New York Chapter of NATO.

** *TelePrompTer County Cable TV,* Order Approving Franchise Amendment Subject to Conditions, October 19, 1973.

822 and 825 of the Executive Law, to require franchise amendments and our approval for the establishment or modification of any subscriber rates. Although we did not grant the theatre owners' requests for strict regulation of "pay cable" programming, we did require that all cable television companies which engaged in or proposed to engage in "pay" cable programming services notify us:

> (1) of the material facts concerning each such existing or proposed operation . . . and
>
> (2) that it will promptly, and with due diligence take whatever measures are necessary to satisfy the requirements of Sections 822 and 825 of the Executive Law.

In early 1974, we adopted revised rules concerning franchising procedures and franchise standards (9 NYCRR Parts 594 and 595). Section 595.1(e) of our Rules states that a franchise will be confirmed by the commission only if it contains:

> A provision setting forth with specificity all rates to be charged by the franchise for any aspect of cable television service, or a provision certifying that the municipality and the franchisee are unable to agree upon the rate or rates to be charged and specifying that said rate(s) shall be determined by the Commission on Cable Television pursuant to section 825(5)(e) of the Executive Law. (fn.)

[fn.]

> Typically, rates are specified with respect to such matters as installation of first service connection; installation of additional connections on same premises; basic monthly service for first connection; basic monthly service for additional connections; *subscription channel*

or channels; converters; use of leased channel or channels; and bulk service to hotels, motels, and others similarly situated. (emphasis added)

RECENT DEVELOPMENTS

Despite the foregoing, no specific actions were taken on our part to force "pay cable" services into the context of local franchises. At that time the extent of "pay cable" in New York was not great and, even with the *TelePrompTer* (Mt. Vernon) decision, a policy of strict enforcement did not appear necessary. We were sympathetic to the generally accepted policy of allowing the cable television industry to develop its "auxiliary" services without hindrance, and were, therefore, reluctant to impose the strict requirements of Sections 822 and 825 upon cable operations and municipalities which had themselves established working understandings regarding the development of "pay cable" services.

We remain sympathetic to the notion of free growth in the field of "auxiliary" cable services. However, the results of such development since the initiation of pay cable, and the failure of many cable operations to comply with our filing requirements, have indicated that our jurisdiction in this area, and the obligations of the Executive Law and our Rules in this regard, must be reaffirmed with a new degree of certainty.

It is now evident that the message contained in our *TelePrompTer* Order of October 19, 1973 and our *Statement of Policy* was not understood clearly by a large number of cable television companies and municipalities in New York. Moreover, the confusion and misapprehension expressed by these companies and municipalities have not been resolved in the time since those actions were taken. Late circum-

stances indicate that the implications of these developments have become increasingly more serious.

Within the past year several cable television companies have unilaterally raised their "pay" rates immediately after they were denied similar increases in their "regular" rates by their respective franchisors.* Some companies have used the institution of Home Box Office service as an offer in negotiation, *quid pro quo,* for increases in their regular rates.** It has been alleged in recent months that, in some localities, cable television companies have refused to initiate Home Box Office programming in punitive retaliation for the actions of their franchisors regarding "regular" rates.*** In other instances, companies have negotiated with their franchisors regarding "pay cable" rates and then have informed the Commission that resulting franchise provisions have no effect due to FCC pre-emption of subscription programming.****

As the provision of Home Box Office Service has become increasingly widespread, many cable television companies have instituted this service and established subscriber rates therefor without specifying those rates in their local franchises.

Discussion and Conclusions

The position of this agency regarding the regulation of subscriber rates for all types of cable television services

---

* *Note, e.g.,* Community Development Long Island Corporation at Oyster Bay.

** *Note, e.g.,* TelePrompTer Corporation at New Windsor and Cornwall.

*** See letter from Pamela M. Farr, Supervisor Town of Big Flats regarding TelePrompTer Cable TV, Inc.

**** *E.g.,* People's Cable at Pittsford.

should never have been doubted by cable operators or municipal officials. The language of the Executive Law and our Rules clearly require all subscriber rates to be established or modified only through the local franchise and with our approval. Our October 19, 1973 pronouncements reiterated this position and made it clear that "pay cable" services were not excluded.

The sole basis for any contrary conclusion is the FCC's purported pre-emption of the field. However, our actions must be guided by our clear statutory mandate until such time as a court of competent jurisdiction has ruled that the FCC has, in fact, duly limited that statutory mandate. No court has yet so ruled, and the actions of the State Supreme Court in the *TelePrompTer* case, referenced above, indicate support for our position.

Not only do we fail to agree with the legality of the FCC's pre-emptive policy; we also question its wisdom. An examination of rate structures and developments in the establishment of subscriber rates has made it evident that a complicated nexus exists between those rates charged for "regular" cable services and those charged for "auxiliary" services. Municipalities are still unsure as to their jurisdiction concerning "pay cable". Moreover, clear instances of abuse resulting from this uncertainty have become evident, as cited above. If the present trend continues, municipalities will have less and less control over subscriber rates as a result of unilateral increases in the premium programming rate rather than the basic rate. For practical purposes, neither the locality nor the State would have control over the price subscribers pay for any cable television services.

The nature of per-channel or other types of specialized cable programming charges may require a distinctive regulatory approach. It may not always be desirable or neces-

sary to regulate "pay cable" subscriber rates without regard to the nature of the locality involved. However, whatever actions are appropriate or may be taken with regard to the regulation of subscriber rates, the public interest requires that all such rates must be approached on an equal jurisdictional basis and that the requirements of applicable statutory law be met.

In view of the above, we wish to make clear that the following policies are consistent with the public interest and may be considered applicable in this matter.

1. All subscriber rates imposed by cable television companies in New York must be authorized by the local franchise held by such companies, as required by Section 825 of the Executive Law.

2. No change in subscriber rates may be adopted without an appropriate amendment of the governing franchise.

3. Any such franchise amendment must be approved by this Commission before it may be effective, as provided in Section 822 of the Executive Law.

4. No exclusion or exemption from the above is provided by State law for rates for any "pay", "auxiliary" or "subscription" cable service.

5. Cable television companies that have already established "pay cable" services without following the appropriate legal requirements, as described above, will not be required at this time to make immediate efforts to amend their respective franchises. Such companies must however, file a formal notice with their respective municipalities and this Commission, within the next two months, describing the nature of their "pay cable" services and the rates *currently* charged to subscribers for such services. Those cable

television companies providing "pay cable" services and not so on record with their respective municipalities and this Commission by April 30, 1976, will face appropriate sanctions.

6. Active enforcement of these policies will be undertaken.

It should be noted that concern has been expressed regarding the effect of the above policies on various special aspects of the "pay cable" market. At this time the market is, by and large, limited to per-channel specialty services providing a standard variety of home entertainment programming (generally represented by the monthly packages provided by Home Box Office). We will remain open to applications for any appropriate modification of our policies, as expressed above, should the development of particular variations of "pay cable" services indicate such modifications.

COMMISSIONERS PARTICIPATING: Robert F. Kelly, Chairman; Jerry A. Danzig, Vice-Chairman; Michael H. Prendergast, Eli Wager, Edward J. Wegman, Commissioners.

APPENDIX F—Statutes Involved.

NEW YORK EXECUTIVE LAW

Section 822. Transfer, renewal or amendment of franchises and transfer of control over franchises and system properties.

1. No transfer, renewal or amendment of any franchise, or any transfer of control of a franchise or certificate of confirmation or of facilities constituting a significant part of any cable television system shall be effective without the prior approval of the commission.

* * *

2. A person wishing to transfer, renew or amend a franchise, or to transfer control of a franchise or of a substantial part of the facilities thereof shall file with the commission an application for approval of such change, in such form and containing such information and supporting documents as the commission may require.

* * *

3. The commission shall approve the application unless it finds that the applicant, the proposed transferee or the cable television system does not conform to the standards embodied in the regulations promulgated by the commission pursuant to section eight hundred fifteen or that approval would be in violation of law, any regulation or standard promulgated by the commission or the public interest: provided, however, that a failure to conform to the standards embodied in the regulations promulgated by the commission shall not preclude approval of any such application if the commission finds that such approval would serve the public interest.

Section 825. Rates

1. Except as otherwise provided in this section, the rates charged by a cable television company shall be those

specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories.

2. Such rates may not be changed except by amendment of the franchise.